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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

RONALD P. WHITE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the art of tattooing is entitled to any First Amendment protection.

PARTIES TO THE PROCEEDING

Petitioner Ronald P. White was the defendant/appellant below.

Respondent State of South Carolina was the appellee below.

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INTRODUCTION

The Supreme Court of South Carolina held that the First Amendment is wholly inapplicable to a statute banning an entire art form. According to that court, artistic expression is conduct, not speech. Based on this premise, the South Carolina Supreme Court held that an artist is protected only if his or her art is "'sufficiently imbued with elements of communication,'" which turns on "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'" App. 5a (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Because the South Carolina court ruled that tattooing does not satisfy this test, it held that the state's complete ban on tattoo artistry is immune from *any* First Amendment scrutiny.

In a free society, this is intolerable. In a society that protects liquor advertising and pornography, it is inexplicable. Art deserves protection as art. To require that it convey a particularized message that is likely to be understood would mean that most modern art, and perhaps all satire, would be entitled to no protection at all. Only those with clear thoughts could translate them into art, and even then, they would have to write in eighth-grade English to ensure they were not misunderstood. Simply put, the South Carolina Supreme Court's decision is at war with artistic freedom.

It also conflicts with decisions of this and other Courts. The South Carolina Supreme Court relied on expressive conduct cases that are designed to determine which conduct, such as flag burning, rises to the level of protected speech. In contrast, this Court has repeatedly protected art as art, regardless of whether it also satisfies the expressive conduct test. Indeed, this Court has expressly determined that the *Spence* test is inapplicable in the context of artistic expression. The Court explained that if First Amendment protections were "confined to expression conveying a 'particularized message' [they] would never reach

the unquestionably shielded paintings of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). The South Carolina Supreme Court's refusal to even acknowledge this controlling and commonsense precedent marks such a sharp departure from the accepted course of judicial proceedings as to call for the exercise of this Court's supervisory powers. *See* S. Ct. R. 10(a).

The South Carolina court conflicted with precedents of other courts as well. The South Carolina Supreme Court used *Spence* as a basis for ruling that even if a tattoo itself is protected by the First Amendment, the art of creating the tattoo is not. In other words, it ruled that the government can punish an artist for creating and disseminating protected art. Not surprisingly, other courts confronted with this startling conclusion, including the Second Circuit, have rejected it. *See Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996). The South Carolina Supreme Court's contrary decision reflects, in part, the uncertainty caused by this Court's precedents. While this Court has determined that the *Spence* test does not apply to artistic expression, it has not announced what test does apply.

This Court's guidance on this fundamental question is needed immediately. As matters now stand, petitioner Ronald White has been criminally convicted for practicing his chosen art form because he drew on skin instead of canvas. South Carolina may have grounds for *regulating* tattoo studios, just as it regulates numerous activities. But a complete ban on an entire art form throughout an entire state strikes at the core of the First Amendment. This Court's review is needed to bring clarity and uniformity to this fundamental arena of constitutional law.

OPINIONS BELOW

The Supreme Court of South Carolina's opinion is reported at 560 S.E.2d 420 and reprinted in the Appendix ("App.") at 1a-

13a. The unreported order denying the petition for rehearing is reprinted at App. 14-15a. The district court's unpublished ruling is excerpted at App. 16a-20a.

JURISDICTION

The Supreme Court of South Carolina entered judgment on March 4, 2002. Petitioner filed a timely petition for rehearing, which was denied on March 21, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because Petitioner is challenging the validity of a state statute under the United States Constitution.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are pertinent to this case:

1. The First Amendment to the United States Constitution states that "Congress shall make no law ... abridging the freedom of speech ...."

2. S.C. Code Ann. § 16-17-700 (2000 Cum. Supp.) declares: "It is unlawful for a person to tattoo any part of the body of another person. It is not unlawful for a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion it is necessary when performing cosmetic or reconstructive surgery.... A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

A. Tattooing in the United States

The art of tattooing is more than 8,000 years old. *See Clinton R. Sanders, Customizing the Body: The Art and Culture of Tattooing* 9 (Temple 1989). It first became popular in the

United States in the early nineteenth century, and has undergone a renaissance in recent years. *See id.* at 16, 19.

Tattooing reached a low point in this country in the early 1960s, when a hepatitis outbreak in New York was thought to have been caused by an unsanitary tattoo artist on Coney Island. Newspapers soon began to spread stories of diseases allegedly contracted from tattoo studios. As public concern grew, and the public image of tattoo art declined, New York City and other jurisdictions initially banned tattooing altogether. *See, e.g.*, N.Y.C. Health Code § 181.15; Mass. Gen. Laws c. 265 § 34 (1962); S.C. Code Ann. § 16-17-700 (1966). Some of these bans were challenged on First Amendment and other grounds, but were generally upheld. *See, e.g., Grossman v. Baumgartner*, 218 N.E.2d 259 (N.Y. 1966); *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980).

In the late 1980s and early 1990s, however, the fears of the 1960s came to pass as understanding of the health risks increased and tattoo artists banded together to ensure the safety of their craft. In 1985, the Center for Disease Control ("CDC") promulgated a set of guidelines known as the Universal Precautions for "personal service workers," including tattoo artists, who might come into contact with bloodborne pathogens. *See* CDC Fact Sheet, *HIV and Its Transmission* (July 1999) (available at www.phppo.cdc.gov). The Occupational Safety and Health Administration subsequently adopted the Universal Precautions in its own bloodborne pathogen rule. *See* 29 C.F.R. § 1910.1030. Any tattoo parlor with at least one employee is now bound by this rule. *See id.*(b).

In light of the success of these regulations, the U.S. Food and Drug Administration ("FDA") has declined to impose further regulations on tattoo inks even though they are subject to regulation as "color additives" under § 201(t) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* *See*

FDA Advisory Opinion, Docket No. 81A-0315/AP (July 21, 1986) (referenced at http://www.fda.gov/cdrh/devadvice). A dermatologist at the FDA's Office of Cosmetics and Colors explained that the most common problem with tattoos is mere "dissatisfaction." FDA Fact Sheet, *Tattoos and Permanent Makeup* (Nov. 29, 2000). Likewise, the Center for Diseases and Radiological Health, a subdivision of the FDA that regulates medical devices, recently stated that it does not regulate tattooing devices because it is "not aware of any immediate hazards to health associated with the use of tattoo equipment nor was it felt that the equipment could not be properly cared for or handled to prevent any hazards." *Tattoo Equipment and Dyes* (available at http://vm.cfsan.fda.gov/~dms/ cos-204.html).

Now, approximately 40 years after the Coney Island incident, nearly every state in the union has determined that tattooing should be regulated, not banned. After the Massachusetts courts invalidated that state's ban on tattooing, *see Lanphear v. Massachusetts*, Sup. Ct., Suffolk County, Case No. 99-1896-B (2000), only two states—South Carolina and Oklahoma—continue to prohibit the art form. Outside of those states, tattoo art has become "the sixth-fastest growing retail business in the United States," as more and more people have embraced this ancient art form. *See Massachusetts v. Meuse*, Sup. Ct., Essex County, Case No. 9977-CR-2644 (1999) (quoting Hoag Levins, *The Changing Cultural Status of Tattoo Art* (1998)).

B. Ronald White's Conviction for Tattooing

In 1999, a local South Carolina television anchor asked petitioner Ronald White, a former tattoo artist, to assist with a three-part piece on the art of tattooing. The television station subsequently aired footage of petitioner, in his house, drawing a tattoo on the arm of another man. *See* App. 1a. The tattoo was a creative adaptation of an ancient tribal tattoo that signifies the onset of adulthood. After the television show aired, the

local Sheriff's office issued a warrant for petitioner's arrest. It is believed to be the only arrest in the thirty-year history of the South Carolina ban. *See* Transcript of Record before Harwell, J. (Oct. 30-31, 2000) at 5:13-5:24 ("Tr.").

At trial, petitioner admitted that he had violated the statute, but argued that the ban violated his First Amendment right to engage in artistic expression. *See* Tr. at 3:19-3:24. Although petitioner readily conceded that there are risks associated with the unsafe practice of tattoo artistry, he testified that he had followed all appropriate safety precautions. *See* Tr. at 18:18-19:17. He further argued that South Carolina's outright ban is not the "least restrictive means" to achieve the state's legitimate interest in the maintenance of public health. *See* Tr. at 45:2-45:24.

The trial court disagreed and upheld the ban. The court found that petitioner had engaged in a creative, artistic endeavor, Tr. at 103:20-25; 114:14-20, but held that fact irrelevant for First Amendment purposes because "even pure speech may be subject to reasonable regulation or prohibition, if it impacts on public health." App. 17a. On this question, the court did not hear any medical testimony, expert or otherwise, on the risk to public health. Instead, it relied solely on petitioner's statement that there can be risks associated with tattooing *if* proper precautions are not followed. *See* Tr. at 66:15-66:23.

In a divided opinion, the South Carolina Supreme Court affirmed. *See* App. 1a-13a. The court determined that the "threshold question" is "whether the conduct in issue is 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* at 5a (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Under this test, the court held that petitioner had "not made any showing that the *process* of tattooing is communicative enough to automatically fall within First

Amendment protection," even if tattoos themselves are protected expression. *Id.* at 6a (emphasis added). As such, the court held that the art of tattooing does not "fall within the First Amendment," is completely "unprotected" by the First Amendment, and is subject to *no* heightened scrutiny under the First Amendment. *Id.* at 7a. The court concluded that South Carolina's ban on tattooing satisfies the rational basis test applicable to all exercises of the state's police power because "the danger associated with the activity of tattooing, whether artwork or not, is a legitimate reason to regulate it." *Id.* at 6a.

Justice Waller vigorously dissented. He stressed that at least some First Amendment scrutiny applies to every form of artistic expression, be it painting, drawing, or tattooing. *See id.* at 10a. He then took issue with the majority's distinction between the process of drawing tattoos and the tattoos themselves, because the protection of art necessarily requires the protection of the process of creating art:

> The majority, by its emphasis of the word "process," appears to indicate that although the process of tattooing is not "speech," the end product thereof may be, such that the tattoo wearer may be entitled to First Amendment protection as the conveyor of a message. In my view, this is akin to saying that an author who is paid a commission to write a book by a publisher, or an artist commissioned to paint a rendering, does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech. I find such an analysis completely untenable.

Id. at 12a n.9. Justice Waller then explained that South Carolina's complete ban on the art of tattooing cannot survive the intermediate scrutiny applicable to content-neutral restrictions because less restrictive measures (*i.e.*, regulation) would suffice to protect the public health. *See id.* at 13a. He further noted that at this point in time, "there is no serious health risk involved in getting a tattoo." *Id.* at 11a.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* for three reasons: the decision below conflicts with decisions of this and other Courts; these conflicts result in part from uncertainties in this Court's jurisprudence; and this is a case of exceptional importance.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

The South Carolina Supreme Court's decision conflicts with this Court's precedents in at least two respects: it fails to protect art as art, and it applies a particularly restrictive test that this Court has expressly determined to be inapplicable to artistic expression. The South Carolina Supreme Court came into further conflict with decisions of other courts, including the Second Circuit, by distinguishing between the application and display of a tattoo. Only by departing from these precedents could the South Carolina Supreme Court rule that tattooing is entitled to *no* First Amendment protection.

A. The Decision Below Conflicts With Decisions of this Court Holding that Artistic Expression Is Entitled to First Amendment Protection.

The South Carolina Supreme Court came into conflict with this Court's decisions holding that artistic expression is protected by the First Amendment, as made applicable to the states by the Fourteenth Amendment. According to the decision below, artistic expression is protected only if it is "'sufficiently imbued with elements of communication'" to qualify as expressive conduct. App. 6a (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). The Court has always protected art as art, without regard to whether it is also "symbolic speech." *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("It is no doubt true that a central purpose of the First Amendment was to protect the free discussion of governmental affairs. But our cases have never suggested that

expression about philosophical, social, *artistic*, economic, literary or ethical matters ... is not entitled to full First Amendment protection.") (internal citations omitted); *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir. 1985) ("[T]he freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of art ...) unless the artistic expression is obscene in the legal sense.").

The proposition that artistic expression is entitled to First Amendment protection without regard to its status as symbolic speech is perhaps most evident in this Court's obscenity jurisprudence. In the 1950s and 1960s, the Court struggled to craft a consensus on a workable definition of obscenity. This was complicated, in Chief Justice Burger's words, by the fact that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious ... artistic ... expression." *Miller v. California*, 413 U.S. 15, 23 (1973). In *Miller*, this Court therefore held that a state can prohibit an allegedly obscene work only if, *inter alia*, "the work, taken as a whole, lacks serious ... *artistic* ... value." *Id.* at 24 (emphasis added); *see also, e.g., Reno v. ACLU*, 521 U.S. 844, 865 (1997) (striking down portions of the Communications Decency Act because it "omits any requirement that [the relevant obscenity provision] lack serious ... artistic ... value," and emphasizing that prong's importance in ensuring that artistic expression is protected).

The *Miller* decision and its progeny thus established that artistic expression is entitled to First Amendment protection in its own right. Moreover, those cases did so *without regard to the specific medium of expression used. See, e.g., Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the expression."). Accordingly, this Court has accorded

protection to a wide array of artistic mediums. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (stating that "the Constitution looks beyond written or spoken words as mediums of expression," and remarking that examples of painting, music, and poetry are "unquestionably shielded"); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("[P]ictures, films, paintings, drawings, and engravings ... have First Amendment protection.").

Neither respondent nor the South Carolina Supreme Court has ever suggested that tattooing is any less an art than other forms of drawing and painting. Nor could they. *See, e.g., Sunrise Review*, South Carolina Reorganization Comm'n, Subcommittee Briefing on Regulation of Tattoo Artists (June 28, 1995) (acknowledging the long history of tattoo art). The art of tattooing is a historic and well-established form of artistic expression. *See The Dictionary of Art* 366 (Macmillan 1996). Archeologists and anthropologists have traced the art of tattooing back to the early Egyptians in 6000 B.C. *See* Clinton R. Sanders, *Customizing the Body: The Art and Culture of Tattooing* 9 (Temple 1989).

The modern history of Western tattoo art began with the exploratory voyages of Captain James Cook and his encounters with tribal tattooing in the South Pacific island of Tahiti. Sanders at 14 (quoting an entry from Cook's 1769 ship journal that reports that "[m]en and women [of Tahiti] paint their bodies" and notes that this is called "ta-tu"). The word "tattoo" entered the lexicon thereafter as Cook's adventures began to

capture the curiosity of the European aristocracies. *Id.* at 15. The tattoo rage soon made its way across the Atlantic to America around the turn of the nineteenth century. The emergence of the first class of tattoo artists in the Bowery district of New York, such as Martin Hildebrand, Samuel O'Reilly, Charlie Wagner, and Lewis Alberts, was spurred by Edison's invention of the electric stencil pen and O'Reilly and Wagner's adaptation thereof—the electromagnetic tattoo machine. *Id.* at 16-17. Most recently, the past three decades have marked a "renaissance" in the world of tattoo artistry. *Id.* at 19. As a Massachusetts court explained in overturning the Commonwealth's tattoo ban:

> The market demographics for tattoo services are now skewed heavily toward mainstream customers. Tattooing today is the sixth-fastest growing retail business in the United States. The single fastest growing demographic group seeking tattoo services is, to the surprise of many, middle-class suburban women. ... Tattooing is recognized by government agencies as both an art form and a profession and tattoo-related art work is the subject of museum, gallery and educational institution art shows across the United States.

Massachusetts v. Meuse, Sup. Ct., Essex County, Case No. 9977-CR-2644 at 5-6 (1999) (quoting Hoag Levins, *The Changing Cultural Status of Tattoo Art* (1998)). The ancient art of tattoo has thus evolved from the domain of early Egyptian tribes to the minivans and soccer moms of today. But the status of tattoos as art has not changed. "Some people buy a van Gogh. Some people buy art by Tattoo Lou. They wear it or they hang it. But it is all art." *See In This Artist's Hands,* N.Y. Times (July 1, 2001). And under this Court's artistic expression precedents, it is all protected by the First Amendment.

B. The Decision Below Conflicts With Decisions of this Court Holding that the *Spence* Test Does Not Apply to Artistic Expression.

The South Carolina Supreme Court's decision conflicts with this Court's precedents not only by holding that artistic expression is not entitled to First Amendment protection, but also by applying the extremely restrictive *Spence* test, which asks "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'" App. 5a (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1974)).

Seven years ago, this Court ruled that the *Spence* test does not apply to artistic expression. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court explained that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' ... would never reach the *unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll*." *Id.* at 569 (emphasis added) (internal citation omitted). In so doing, the Court specifically contrasted *Spence*—the very case upon which the South Carolina court relied. *See id.*

Almost of all this Court's artistic expression cases are to the same effect as *Hurley*. All of these cases recognize that the act of engaging in artistic expression is a protected First Amendment activity. And *not a single one* of those cases conditions that protection on the restrictive *Spence* factors. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (art); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures). Artistic expression has always been considered a pure form of expression protected by the First

Amendment in its own right. The South Carolina Supreme Court came into square conflict with this Court's precedents by holding otherwise.

C. The Decision Below Conflicts with Decisions of Other Courts Holding that the Dissemination of Protected Art Is Itself Protected.

The decision of the Supreme Court of South Carolina conflicts not only with these important precedents of this Court, but also with decisions of other courts, including the Second Circuit. The South Carolina Supreme Court used *Spence* as a basis for ruling that even if a tattoo itself is protected by the First Amendment, the art of creating the tattoo is not. *See* App. 6a. In other words, it ruled that the state can punish an artist for creating protected art. Not surprisingly, other courts confronted with this profoundly anti-liberty conclusion have rejected it.

In *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), the Second Circuit invalidated a municipal ordinance barring visual artists from selling their work in public places under certain circumstances. The City of New York advanced the same arguments accepted by the South Carolina court here—that "visual art [is] mere 'merchandise' lacking in communicative concepts or ideas," and "the sale of art is conduct, and in order to be constitutionally protected, the sale of protected material must be inseparably intertwined with a particularized message." *Id.* at 695 (internal quotation omitted). The Second Circuit, citing *Hurley*, made short work of both arguments. Rejecting the application of *Spence*, it held that art is entitled to First Amendment protection because it is inherently expressive, even when it does not express a "particularized message" that is readily ascertainable. *Id.* at 696. The court then struck down the ordinance as unconstitutional because its "effective bar on the sale of artwork in public places" was "too sweeping to pass constitutional muster." *Id.* at 697.

The South Carolina court's decision in this case cannot be reconciled with *Bery*. *Bery* held *Spence* inapplicable and struck down a ban on the sale of visual art; the South Carolina court followed *Spence* and upheld a ban on the act of tattooing, which constitutes both the creation and sale of visual art. If anything, the South Carolina statute is more radical than New York's now-jettisoned measure. It is certainly not more defensible, given that the New York artists were free to create art and sell it in private places, while petitioner was criminally convicted for drawing a spiritual tattoo in his own home.

In addition to conflicting with *Bery*, the decision below conflicts with a recent Massachusetts decision striking down a nearly identical ban on tattooing. *Lanphear v. Massachusetts*, Sup. Ct., Suffolk County, Case No. 99-1896-B (2000), at 7; *see also Massachusetts v. Meuse*, Sup. Ct., Essex County, Case No. 9977-CR-2644 (1999) (dismissing tattooing indictment on First Amendment grounds). The Massachusetts court noted that tattooing "is believed to be the most commonly purchased form of original art work in the United States," and "the subject of museum, gallery, and educational institution art shows across the United States." *Id.* at 7. Citing *Hurley*, the court did not attempt to sever the act of creating a tattoo from the tattoo itself, because "the act of creating a tattoo is intrinsically part of the expressive content of the art," and is therefore subject to First Amendment protection in its own right. *Id.* at 10. Given the extreme nature of a total ban on an entire form of artistic expression, the court then ruled that the statute was unconstitutional on its face.

II. THESE CONFLICTS REFLECT LINGERING UNCERTAINTIES IN THIS COURT'S JURISPRUDENCE.

These conflicts reflect lingering uncertainties in this Court's jurisprudence. "While it is generally accepted that the First Amendment contemplates protection of art, the questions why

and to what extent have not been satisfactorily answered to date." Marci A. Hamilton, *Art Speech*, 49 Vand. L. Rev. 73, 77 (1996).

Hurley magnified the uncertainties regarding the proper treatment of artistic expression. In *Hurley*, this Court recognized that art defies the *Spence* test because not all art has a specific message that is readily apparent. *See* 515 U.S. at 569. But like the cases that had come before it, *Hurley* did not identify the proper test for lower courts to apply.

Part of the reason for the continuing jurisprudential uncertainty is that this Court has not had occasion fully to articulate the reason artistic expression is protected by the First Amendment. Instead, this Court has made varying suggestions on this pivotal point. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court appeared to suggest that protection is warranted by "the subtle shaping of thought which characterizes all artistic expression." *Id.* at 501 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)). But in *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), the Court suggested that the animating principle may be a broader conception of individual autonomy:

> Music is one of the oldest forms of human expression. ... [R]ulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state .... The Constitution prohibits any like attempts in our own legal order.

Id.; *see also Finley*, 524 U.S. at 602-03 (Souter, J., dissenting) ("Art is entitled to full protection because our cultural life, just like our native politics, rests upon the ideal of government viewpoint neutrality.") (internal quotations and citation omitted); Hamilton, 49 Vand. L. Rev. at 78 (suggesting an "anti-tyranny" rationale). A number of commentators have advanced still other potential theories. *See, e.g.*, Sheldon H.

Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime, and the First Amendment*, 1987 Wis. L. Rev. 221 (1987) (discussing the aesthetic theories of Plato and Kant as a basis of an artistic expression doctrine).

The reason for protecting artistic expression will necessarily influence (if not determine) the level of protection accorded such expression. This case presents an ideal opportunity to address that issue and enunciate the guiding principles in this area. Doing so will go a long way toward bringing clarity to the law and permitting artists like petitioner to practice their arts without fear of criminal conviction.

III. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

The exceptional importance of these First Amendment issues speaks for itself and warrants *certiorari* in its own right. *See Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). This Court has recognized that a grant of *certiorari* is called for in the First Amendment context, even in the absence of a circuit split, "to clarify the legal standard applicable to [a] governmental regulation." *Id.*; *accord City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002).

South Carolina's decision not to tailor its statute in any way—but instead to prohibit all tattooing that is not performed by a doctor for medical reasons—further heightens the importance of this case and the need for *certiorari*. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478) (granting *certiorari* to consider whether commercial speech ban failed "to advance a governmental interest in a direct and material way"). Complete bans on an entire medium of expression are subject to strict scrutiny precisely because they are contrary to our most fundamental constitutional values. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Accordingly, this Court has repeatedly invalidated attempts to

ban an entire medium of expression. *See, e.g., City of Ladue*, 512 U.S. at 56 (residential signs); *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (live entertainment); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (handbills); *Schneider v. State*, 308 U.S. 147 (1939) (door-to-door distribution of literature); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (pamphlets). Because the South Carolina statute prohibits all artistic tattooing—including all tattooing by anyone other than physicians and surgeons—it is subject to strict scrutiny. *Cf. City of Ladue*, 512 U.S. at 47 n.6 (invalidating statute notwithstanding its myriad exceptions).

The South Carolina statute is so far out of line with First Amendment values that it could not survive even intermediate scrutiny. In the courts below, the State of South Carolina attempted to justify the statute based on public health concerns. But the state introduced *no* evidence in support of this concern. *See* App. 2a. It cannot possibly overcome intermediate scrutiny merely by alluding to vague, undefined health risks. While it is true that some risks are involved when tattooing is done without proper precautions, the issue in this case is not whether tattooing poses some risks—it does—but whether the state has gone too far by banning the art altogether instead of regulating it.

It has. South Carolina is one of only two states that still impose a complete ban on tattooing. In the forty years since the Coney Island incident, society's understanding of the risks associated with tattooing and the proper precautions to alleviate those risks has increased exponentially. *See* pages 4-5, above. It is now widely accepted that the art of tattooing can be practiced safely. *See id.* Accordingly, South Carolina's outright ban cannot withstand any level of First Amendment scrutiny.

The First Amendment issues presented in this case are especially important because a ban on the act of tattooing is

effectively a double ban on the expression of tattoo artists *and* their patrons. If petitioner cannot perform his chosen artistry, his patron cannot display whatever message—political, religious, or social—he or she wishes to convey by wearing the art that petitioner creates. The First Amendment interests of those who wear tattoos are obvious. If a man can wear a profane slogan on his back in public, *see Cohen v. California*, 403 U.S. 15, he can surely wear a wide variety of tattoos on his body. But the Supreme Court of South Carolina has deprived its citizens of the right to *wear* tattoos by preventing artists and others from *drawing* tattoos. This double injury to First Amendment freedoms makes this case all the more important.

****

As matters now stand, an entire art form has been banned throughout an entire state and petitioner has been criminally convicted for safely drawing a spiritual tattoo in his own home. This Court's review is needed now.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 19, 2002

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APPENDIX A

Supreme Court of South Carolina

The STATE, Respondent,
v.
Ronald P. WHITE, Appellant.

No. 25421.

Heard Nov. 14, 2001.
Decided March 4, 2002.
Rehearing Denied March 21, 2002.

Chief Justice TOAL.

Ronald P. White ("Appellant") appeals his conviction for violation of section 16-17-700 of the South Carolina Code, prohibiting the tattooing of another person except by a licensed physician for cosmetic or reconstructive purposes. S.C.CODE ANN. § 16-17-700 (Supp.2000). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant was indicted by the grand jury for the Court of General Sessions of Florence County for violating section 16-17-700 of the South Carolina Code. Appellant was arrested sometime after WBTW TV aired a clip of him tattooing another person in his Florence County residence as part of a series WBTW prepared on tattooing. At trial, Appellant admitted he violated the statute, but argued the statute was unconstitutional on several grounds. Appellant made a motion to quash the indictment at the beginning of trial, arguing the statute was unconstitutional because (1) it impermissibly restricted his

freedom of speech in violation of the First Amendment of the United States Constitution and Article I, Section 2 of the South Carolina Constitution, (2) it restricted interstate commerce, and (3) it violated the Privileges and Immunities Clause of the United States Constitution.

The trial court found the statute constitutional. First, it found that tattooing was not speech, and, second, even if it were, prohibition of tattooing was a valid exercise of state power because of its impact on public health. The court dismissed Appellant's other constitutional claims on the same grounds, stating that the legislature may use "appropriate means" to "regulate or prohibit, if necessary" any occupation to protect public health. Finally, the court found that all contract and property rights are subject to "fair exercise of the police power to promote the general welfare." As Appellant admitted he violated the statute, he was found guilty as charged. He was sentenced to one year imprisonment and fined $2,500.00, suspended to five years of probation and a fine of $500.00.

The trial court did not hear any expert medical testimony regarding the dangers of tattooing or the risks to public health caused by the process of tattooing. In finding tattooing posed a risk to public health, the trial court relied on Appellant's own concession that there were risks to unregulated tattooing and on the general notion that it is the legislature's responsibility to decide what is injurious to public health.

Appellant appeals the trial court's decision, raising the following issue:

Did the trial court err in finding section 16-17-700 of the South Carolina Code[1] does not violate Appellant's freedom of speech as protected by the First Amendment of the United States Constitution[2] and Article I, Section 2 of the South Carolina Constitution[3]?

LAW/ANALYSIS

Appellant argues the trial court incorrectly upheld section 16-17-700 of the South Carolina Code, insisting the act of tattooing constitutes speech protected by the First Amendment. Appellant argues tattoos are a form of art or expression protected by the First Amendment. Assuming tattoos are protected expression, Appellant reasons those who create them should be afforded the same protection that he claims the creators of other protected expression enjoy (e.g., writers, painters, and sculptors). Appellant contends the process of tattooing cannot be separated from the display of the tattoo itself and both are protected under the First Amendment. We disagree.

The State argues that the trial court correctly upheld the statute, finding tattooing is not speech, and a rational relationship exists between the statute and public health. For support, the State cites several out of state, appellate and trial level opinions in which similar statutes have been upheld. *State v. Brady*, 492 N.E.2d 34 (Ind.App.1986); *People v. O'Sullivan*, 96 Misc.2d 52, 409 N.Y.S.2d 332 (N.Y.Sup.App.Term1978); *Yurkew v.*

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[1] S.C.CODE ANN. § 16-17-700 (Supp.2000).

[2] U.S. Const. amend. I.

[3] S.C. Const. art. I, § 2.

Sinclair, 495 F.Supp. 1248 (D.Minn.1980). In each of these opinions, the court found tattooing did not constitute speech and then proceeded to analyze the statute applying a rational basis standard. *Id.* Each court determined (largely based on their common knowledge) that there are inherent risks to tattooing and gave the state's legislature wide latitude to determine how to best protect the general welfare of the state's inhabitants. *Id.* We agree with this position.

Our precedent establishes a general presumption of validity for legislative acts when subjected to constitutional attack, which can be overcome only by a clear showing that the act violates some provision of the Constitution. *Main v. Thomason*, 342 S.C. 79, 535 S.E.2d 918 (2000); *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution. If the challenging party is able to show the act is invalid, leaving "no room for reasonable doubt that it violates some provision of the Constitution," the burden shifts to the state. *Thomason*, 342 S.C. at 86, 535 S.E.2d at 921 (citing *Westvaco Corp. v. South Carolina Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995)). If the challenging party is unable to do so, however, it has not met its burden, and the challenge fails under this analysis.

Whether or not tattooing qualifies as speech, symbolic speech, or otherwise protected expression under the First Amendment is an issue of first impression in South Carolina. We look to the United States Supreme Court for guidance in analyzing this issue. According to the United States Supreme Court, the First Amendment protects speech, including conduct, if sufficiently communicative in character. *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842

(1974). The threshold question then is whether the conduct in issue is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 409, 94 S.Ct. at 2730, 41 L.Ed.2d at 846. Admittedly, this test requires line drawing. The Supreme Court has acknowledged this implicitly, but held it could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672, 679 (1968) (upholding defendant's conviction for burning his draft card on the courthouse steps against the challenge that the conduct amounted to expression protected by the First Amendment).

In determining whether certain conduct is within the boundaries of First Amendment protection, the Supreme Court has "asked whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353 (1989) (citing *Spence*, 418 U.S. at 410-411, 94 S.Ct. at 2730, 41 L.Ed.2d at 846) (finding defendant's burning of the American flag during the Republican party's renomination of Ronald Reagan for President to be sufficiently imbued with elements of communication to qualify as protected conduct). In *Johnson*, the Supreme Court found the traditional use of flags for the communication of beliefs and the context in which the flag was burned to be instructive in determining the conduct was protected. *Id.* Additionally, the Supreme Court has considered relevant whether the conduct at issue would qualify as a "medium" for expression. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098, 1105 (1952) (holding

film to be protected under the First Amendment after noting it was a "significant medium for the communication of ideas").

In the present case, the resolution of Appellant's claim that the process of tattooing is protected expression depends on whether the Court finds that tattooing is "sufficiently imbued with elements of communication" as required by *Spence v. Washington*. 418 U.S. at 409, 94 S.Ct. at 2730, 41 L.Ed.2d at 846. Appellant claims the act of tattooing is artistic self-expression. However, the relevant inquiry is whether the act of tattooing is sufficiently communicative to warrant protection. Appellant has not made any showing that the process of tattooing is communicative enough to automatically fall within First Amendment protection. Burning of the flag, despite its potential safety risks, was protected because it conveyed an obvious political message. *Johnson*. Unlike burning the flag, the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risks to public safety.

We agree with the dissent to the extent it argues content is not a justifiable reason to regulate tattooing, but find that the danger associated with the activity of tattooing, whether artwork or not, is a legitimate reason to regulate it. The dissent fails to recognize that tattooing, as opposed to painting, writing, or sculpting, is unique in that it involves invasion of human tissue and, therefore, may be subject to state regulation to which other art forms (on non-human mediums) may not be lawfully subjected.

In *O'Brien*, the Supreme Court made it clear the First Amendment does not protect all expressive conduct, even if intended to communicate. As discussed, application of the Supreme Court's test to determine what conduct is protected

requires some line drawing. Based on the record before us, we find that the act of tattooing falls on the unprotected side of the line. Appellant has not met his burden to show why tattooing, an invasive procedure, with inherent health risks, would fall within the First Amendment. *State v. Brady*; *People v. O'Sullivan*; *Yurkew v. Sinclair*.

Because we find the statute does not prohibit constitutionally protected conduct under the First Amendment, we will apply the test enunciated by this Court in *Main v. Thomason*, 342 S.C. 79, 535 S.E.2d 918 (2000). In *Thomason*, we addressed the extent of the legislature's authority to legislate for the protection of public health and general welfare. This Court stated, "[c]ourts will not interfere with the enforcement of regulations designed for the protection of health, welfare, and safety of citizens unless they are determined to be unreasonable." *Id.* at 86-87, 535 S.E.2d at 921- 22 (citing *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955)). "[T]he exercise of the police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." *Id.* at 87, 535 S.E.2d at 922 (emphasis added).

Under this analysis the challenging party again bears the initial burden, albeit a lesser one, to show the statute is arbitrary and has no reasonable relation to a lawful purpose. *Thomason*. If the challenging party makes this showing of arbitrariness, the burden shifts to the State to prove reasonableness. *City Council of Virginia Beach v. Harrell, III*, 236 Va. 99, 372 S.E.2d 139 (1988).[4] If the challenger cannot meet this threshold burden, the

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[4] The Virginia Supreme Court described the analysis succinctly: "if the reasonableness of the enactment is fairly debatable, a court will not substitute its judgment for that of the legislative body. When, however, the presumption

(continued...)

statute is presumed to have a rational relationship to a legitimate purpose within the authority of the legislature's police power and will be upheld.

In our opinion, Appellant, in this case, has not met this threshold burden; he has not rebutted the presumption of validity by showing the statute is arbitrary and unreasonable, with no relation to a legitimate governmental interest. *Thomason*. Appellant put forth no evidence other than his own testimony and the testimony of Mr. Black, a licensed tattoo artist in 12 states, regarding the safety or danger of tattooing. Neither Appellant nor Mr. Black has any medical training and both admitted there are risks to tattooing if the proper precautions are not taken. Although the State also failed to introduce current evidence of the risks associated with tattoos, the burden rested on Appellant to show the prohibition bears no reasonable relation to public health. The State argues tattooing can lead to hepatitis and other communicable diseases, and Appellant admitted tattooing does cause these risks if the proper sterilization measures are not taken. According to Appellant's own testimony, then, in the absence of affirmative regulation by the State, tattooing can endanger public health. With this admission, Appellant as much as conceded a rational relationship between tattooing and public health. As discussed, the legislature's exercise of police power is not subject to judicial correction unless its action is arbitrary and unreasonable. *Thomason*.

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[4] (...continued)
of validity is challenged by probative evidence of unreasonableness , the enactment cannot be sustained unless the legislative body meets the challenge with some evidence of reasonableness." *Id.* at 101-02, 372 S.E.2d at 141

The rational basis analysis set out in our precedent to test the legislature's authority under its police power gives the statute a strong presumption of validity. Appellant has not put forth any evidence to show that S.C.CODE ANN. § 16-17-700 serves no legitimate interest in protecting public health and thus has not overcome the presumption of constitutionality.

CONCLUSION

For the foregoing reasons, we AFFIRM the trial court and uphold Appellant's conviction.

MOORE, BURNETT and PLEICONES, JJ., concur.

WALLER, J., dissents in a separate opinion.

Justice WALLER dissenting.

I dissent. In my opinion, tattooing is "sufficiently imbued with elements of communication so as to fall within the scope of the First Amendment." *State v. Ramsey*, 311 S.C. 555, 430 S.E.2d 511 (1993).

The majority recognizes that, in determining whether conduct is protected by the First Amendment, the United States Supreme Court inquires whether an "intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct.

2533, 105 L.Ed.2d 342 (1989).[5] In my view, there is no doubt that, in creating words, pictures, or images on the bodies of those who wear tattoos, White is intending to convey a message and the message is likely to be understood by those who view it.

In my opinion, White's conduct in creating tattoos is a form of art which is entitled to the same protection as any other form of art. If a painter who creates an image on a piece of canvas has created a work of "art" thereby engaging in "speech" worthy of First Amendment protection, I see no reason why a tattoo artist who creates the same image on a person's body should be entitled to less protection.[6] In my view, whether or not something is "speech" protected by the First Amendment cannot focus upon the medium chosen for its expression.[7]

Although the majority cites several cases which have held that tattooing is not "speech," those cases were decided in an era when tattooing was regarded as something of an anti-social sentiment.[8] As noted in a recent synopsis,

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[5] *Johnson* held burning an American flag constitutes speech worthy of First Amendment protection.

[6] As noted recently in a New York Times article, "Some people buy a van Gogh. Some people buy art by Tattoo Lou. They wear it or they hang it. But it is all art." New York Times; Long Island Weekly Desk, In this Artist's Hands, Skin is the Canvas (Sunday, July 1, 2001).

[7] Indeed, it would be ludicrous to suggest that because Michelangelo chose the ceiling of the Sistine Chapel upon which to paint, his renderings are not communicative.

[8] Moreover, certiorari to the United States Supreme Court was not sought in any of the cited cases, and it appears that Court has never addressed this issue.

> The cultural status of tattooing has steadily evolved from that of an anti- social activity in the 1960s to that of a trendy fashion statement in the 1990s. First adopted and flaunted by influential rock stars like the Rolling Stones in the early 1970s, tattooing had, by the late 1980s, become accepted by ever broader segments of mainstream society. Today, tattoos are routinely seen on rock stars, professional sports figures, ice skating champions, fashion models, movie stars and other public figures who play a significant role in setting the culture's contemporary mores and behavior patterns ...
>
> The market demographics for tattoo services are now skewed heavily toward mainstream customers. Tattooing today is the sixth-fastest-growing retail business in the United States. The single fastest growing demographic group seeking tattoo services is, to the surprise of many, middle-class suburban women.
>
> Tattooing is recognized by government agencies as both an art form and a profession and tattoo-related art work is the subject of museum, gallery and educational institution art shows across the United States.

"The Changing Cultural Status of Tattoo Art" (http:/ www.tattooartist.com/history.html); *See also* Lawrence Muhammed, Tattoo You, Chicago Tribune (Nov. 4, 1997)(recognizing that tattoos have begun to appeal to people from every walk of life, and that, contrary to popular belief, there is no serious health risk involved in getting a tattoo, either. In most tattoo parlors, needles and inks are single-serve, gloves are

worn and other utensils are steam/autoclave-sterilized, the same method used by hospitals for surgical equipment).

Consistent with the more modern trend, it is my opinion the process of tattooing is indeed a protectable form of speech.[9]

Accordingly, since tattooing may be considered speech, it is subject to a higher level of scrutiny than that imposed by the majority. As White concedes, section 16-17-700 is, in effect, a "content-neutral" regulation which is subject to an intermediate level of scrutiny, i.e., it will be sustained if it a) furthers an important governmental interest, b) that interest is unrelated to the suppression of free speech, and c) the incidental restriction on speech is no greater than essential to the furtherance of that interest.[10] *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In interpreting "content- neutral" ordinances, this Court has noted that "[p]ermissible time, place, and manner restrictions are justified by a substantial governmental interest unrelated to free speech and allow[ ] for adequate alternative avenues of communication ..." *Harkins v. Greenville County*, 340 S.C. 606, 613, 533 S.E.2d 886, 890 (2000).

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[9] The majority, by its emphasis of the word "process," appears to indicate that although the process of tattooing is not "speech," the end product thereof may be, such that the tattoo wearer may be entitled to First Amendment protection as the conveyor of a message. In my view, this is akin to saying that an author who is paid a commission to write a book by a publisher, or an artist commissioned to paint a rendering does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech. I find such an analysis completely untenable.

[10] White concedes section 16-17-700 meets the first two prongs.

Here, section 16-17-700 effectively provides no alternative avenue of communication; it makes it unlawful for a person to tattoo any part of the body of another person, but provides that "[i]t is not unlawful for a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion it is necessary when performing cosmetic or reconstructive surgery." It taxes the brain to conceive of a manner in which White may practice his tattoo artistry. Even assuming, arguendo, he were to attend medical school and obtain a medical degree and license to practice medicine, he would still not be permitted to exercise his artistry for the purpose of expressing a communicative idea; the statute forbids tattooing unless it is medically necessary while performing cosmetic or reconstructive surgery. The statute is, in effect, a complete ban on any and all tattooing when done for artistic or communicative purposes. In my view, such a complete ban on the right of free speech cannot stand.

Although I agree, wholeheartedly, that the state may stringently regulate tattooing, the present record is insufficient to demonstrate that the restriction on White's speech is "no greater than essential" to the furtherance of the state's interest in protecting the health and well-being of its citizens.[11] Accordingly, I would hold section 16-17-700 violates White's First Amendment right of free speech.

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[11] In fact, as noted by White in brief, some 46 states permit and regulate tattooing, and "[n]ot one reported death has been associated with tattooing in its five thousand year history."

APPENDIX B

[seal of the Supreme Court of South Carolina]

The Supreme Court of South Carolina

DANIEL E. SHEARHOUSE
CLERK OF COURT

POST OFFICE BOX
COLUMBIA, SOUTH CAROLINA 29211

BRENDA F. SHEALY
DEPUTY CLERK

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March 21, 2002

Jared A. Newman, Esquire
Daugs, Tedder & Newman
P.O. 1282
Beaufort, SC 29901-1282

Re: The State v. White, Ronald P.

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for Rehearing is Denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

I would grant hearing.

s/ John H. Waller, Jr. J.

March 21, 2002."

The remittitur is today being forwarded to the lower court.

Very truly yours,

CLERK

DES/djp

cc: Attorney General Charles M. Condon
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Charles H. Richardson
Edgar Lewis Clements, III, Esquire

APPENDIX C

STATE OF SOUTH CAROLINA	)
COUNTY OF FLORENCE	)COURT OF GENERAL SESSIONS
	)99-GS-21-1543
STATE OF SOUTH CAROLINA	)
vs.	)TRANSCRIPT OF RECORD
	)
RONALD P. WHITE	)October 30-31, 2000
Defendant.	)Florence, South Carolina

BEFORE:

HONORABLE B. HICKS HARWELL, JR., Judge.

APPEARANCES

ROBERT WELLS, Deputy Solicitor
Attorney for the State

JARED S. NEWMAN, Esquire
Attorney for the Defendant

Keshia Reed
Circuit Court Reporter

* * *

[66]Whether tattooing be an art form, we do not deem it speech, or even symbolic speech. However, even pure speech may be subject to reasonable regulation or prohibition, if it impacts on public health. You can't holler fire in a theater or do something that impacts on public health. The defendant's right to engage in tattooing, is not and I emphasize is not paramount to the public's right to good heath.

The defendant in this case admits there is risk inherent. There is in other words danger without regulation. There is no regulations in South Carolina. It is specifically prohibited except with the enumerated exceptions in the statute. When the object of legislation is not the suppression of free speech, but the promotion of public health, there is no constitutional violation even if there is some incidental interference with liberty or property.

[67]And I cite People vs. O'Sullivan, which is the case in the New York Supreme Court decide 1978, and in 409 N.Y. 2nd, page 332. The cites reference by the Solicitor are not only on point. They are persuasive and convincing. And the appellate courts in the cases cited have been reviewed at the appellate level. And those jurisdictions, which include Florida and New York.

Counsel for the defendant is unable to furnish me not only any cites supported position in South Carolina. But no cites from the Appellate Court in the cases furnished. It is apparent for this court – This is a novel issue in this case. It is an issue of first impression in South Carolina. The Court after having made a diligent search is unable to find any cases in South Carolina, which are reflected of this issue. And at the Court's request, where both the State and defense counsel have had a great deal more time than the Court has had this afternoon anticipating this matter.

And specifically at the Court's request neither the Assistant Solicitor Mr. Wells nor defense counsel, Mr. Newman have furnished the Court any authority or cites in South Carolina on this issue supporting their position.

[68] It is the judgment of this court that this a matter in which the South Carolina General Assembly has the sole prerogative and who have invested a legitimate interest in the health and welfare of it's citizens. Therefore, I respectfully, Mr. Newman, deny your motion to quash the indictment on constitutional grounds and the authority cited by the defendant.

* * *

* * *

[70]MR. NEWMAN: You have denied us on First Amendment under the South Carolina Constitution of the First Amendment that are parallel Article 1 Section 3, are due process. Article 1 Section 2 on the right to privacy?

THE COURT: That is correct. Violation of the First Amendment.